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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 557.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *et al.*,
Defendants-Appellees.

On Appeal From the United States District Court
for the Southern District of New York

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM.

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BRIEF IN OPPOSITION TO MOTIONS BY THE SOLICITOR GENERAL AND BY INTERVENOR, UNITED PARCEL SERVICE, INC., TO DISMISS APPEAL PURSUANT TO RULE 16(1)(c) OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

Statement.

The Solicitor General and United Parcel Service, Inc. (hereinafter referred to as United Parcel) attempt to dispose of this case on three asserted grounds, namely,

(1) that the issues raised in the Statement as to Jurisdiction were not raised below (see pages 5 and 6 of the motion of the Solicitor General, and page 6 of United Parcel's motion);

(2) that the legality of the tariff device may not be decided in a proceeding brought to secure a motor carrier certificate under Section 207 of the Interstate Commerce Act (see pages 6-9 of the motion of the Solicitor General and pages 4-6 of United Parcel's motion); and

(3) appellant has not challenged the main and subsidiary findings which support the order of the Commission* (see pages 4 and 5 of the Solicitor General's motion and pages 3, 4, 7 and 8 of United Parcel's motion).

ARGUMENT.

(a)

It was urged below that the tariff device was unlawful and that it vitiated the essential findings of (1) convenience and necessity and (2) ability to furnish the service proposed.

There is implied in United Parcel's argument (pages 5 and 6 of its motion to affirm) that appellant attacked the validity of the tariff device only after the certificate proceedings had been concluded, and after the tariff had been filed. Such is not the case. The attack was made throughout the certificate proceedings.

At the very beginning of the certificate proceedings question arose as to the materiality of the testimony of United Parcel's Secretary and Director concerning United Parcel's low rates of which the weekly charge for pickup once each business day regardless of need was the heart.

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* The General Solicitor concedes that appellant has urged "that United Parcel failed to prove its ability to conduct the proposed operation 'without the unlawful tariff device'" (Solicitor General's motion, page 5).

When protestants objected to such testimony, counsel for United Parcel said (R. 382):

> "Mr. Examiner, the rates are not being offered, obviously, for approval of rates but they are, I may suggest, *basic to the case.*" (emphasis supplied)

The public witnesses were solicited on the basis of low rates competitive with Parcel Post (Exhibit 56, *R. 1344*, in evidence 1021, R. 521).

The only evidence in the record that United Parcel is able to furnish the service proposed at rates sufficiently low to attract business from Parcel Post and therefore that United Parcel is able to attract the volume upon which its ability to provide the service depends is its past experience (United Parcel's motion to dismiss, p. 7). But its past experience has been in connection with this same unlawful device of the $2.00 per week charge (R. 367, 432, 433, 992, A-40). In fact United Parcel had no plan other than that including the weekly charge for daily pickup regardless of need or demand (R. 436, 437).

The Examiner and the Commission accepted the observation of United Parcel's counsel that rates were "basic to the case". The Examiner said (A-18, 19):

> "Applicant's ability to provide the service proposed at rates sufficiently low to attract the business from the parcel post system is dependent upon its obtaining a large volume of business and upon it being able to handle such volume in an efficient and expeditious manner."

Division 1 of the Commission said in its report (A-37):

> "The record reveals that applicant's affiliates have developed a highly efficient system for the dis-

> tribution of small parcels, and *in order to render this type of service they have established rates on a level with the parcel post system.*" (emphasis supplied.)

The following amply establishes that appellant urged before the Commission and before the court below that absent the unlawful tariff device there was no substantial evidence supporting the basic findings of (1) convenience and necessity, and (2) ability to perform the service proposed.

In its Exception No. 4 to the Recommended Report and Order of the Examiner, appellant said (R. 83):

> "The Examiner erred in finding that inquiry into applicant's practices is premature in this proceeding; that the legality of such practices need not be determined in this proceeding and would not constitute a bar or obstacle to certification regardless of whether or not they might later be found to be inconsistent with or repugnant to the authority granted by certification."

In its argument on Exception No. 4 quoted immediately above appellant said (R. 94):

> "Certainly, it is indisputable that applicant, if certificated, will be required to file tariffs and to comply with all applicable rules. The essential question is whether upon compliance with all applicable rules and with the statute governing common carriers, *applicant will still be able to offer the low rates* which made its services attractive to shippers and *which convinced the Examiner that its service was needed.*"

In its petition to the Commission for reconsideration appellant said (R. 185-190):

"Both the Examiner and Division 1 *refuse* to find that applicant could operate lawfully and still perform the *service it proposed.* Rather, it is found that applicant could operate lawfully and still render 'an efficient service responsive to the public need.'

"This may or *may not* be true. It is *pure speculation,* unsupported by any evidentiary fact. It *assumes* that the support given this application *as proposed* would still be given if it were necessary to *change or amend* the character of service or the *rate structure* proposed.

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"It is of no significance that 'applicant has evinced a willingness to comply strictly' with the law. The question is: Can the operation which it proposed, the only operation here involved, be performed in strict compliance with the law? Can it produce that which it promised, that which gained it the support of public witnesses? If not, no certificate can issue."

In its complaint filed in the District Court appellant alleged (R. 3-5):

"VIII. The public witnesses whose testimony the Commission accepted as supporting its finding of public convenience and necessity were solicited by United Parcel and their testimony was based on the unlawful and unjustly discriminatory proposal of the United Parcel as is more particularly shown by the excerpts from the record in said Docket No. MC-115495 annexed hereto as Exhibit 'D'.

"IX. Plaintiff in its brief submitted after hearing, in its exceptions to the examiner's report, and in its petition for reconsideration in said Docket No. MC-115495 has urged (1) that the United Parcel proposal to charge $2.00 per week for pickup each

> business day regardless of need is unlawful and (2) that the public witnesses have been solicited on the basis of rates which are dependent upon the proposal or system, the heart of which is the $2.00 per week pickup service; and the Commission has declined to pass upon the validity of such provision, but nevertheless, has accepted as supporting its conclusions the assertive consequences of United Parcel System of which the pickup charge is the heart, such consequences including low rates to consignors of many shipments and a high rate to the shipper of but one shipment per week."

In its motion addressed to the court below for an order to amend the court's findings and to alter judgment appellant said (R. 1848, 1849):

> "Plaintiff does not urge that the rate itself is unlawful if the device is lawful. It does urge that the device of a weekly charge, whether it be $2.00 or $4.00 or any other sum, for pickup service per week is unlawful. And plaintiff urges further that because the device is unlawful there is no evidence of a lawful or proper operation which United Parcel is able to perform and which is convenient and necessary to the public."

(b)

Where low rates are "basic to the case", the validity thereof is also basic.

To permit the granting of a motor carrier certificate upon evidence of which low rates are basic, would be an open invitation to fraud if, when challenged, the applicant were not required to show that he could operate lawfully and successfully on the basis of such rates.

United Parcel at pages 7 and 8 of its brief urges that appellant has made "the unwarranted assumption through-

out its statement of jurisdiction that the exact tariff to which it objects is 'essential' to the United Parcel Service."

The testimony of the Secretary and Director of United Parcel, the only evidence on the subject, shows that United Parcel has no plan for rates and no experience other than that including the incentive $2.00 per week pickup charge regardless of need or demand (R. 367, 432, 433, 436, 437, 922). Therefore, there is no evidence in the record supporting ability to furnish the service proposed absent the unlawful $2.00 per week charge. See Point (b), page 14 of Statement as to Jurisdiction.

At the top of page 8 of its motion United Parcel makes the unwarranted assumption that "a practical alternative can and will be available" if the weekly charge for pickup service is unlawful. Since rates are "basic" protestants to United Parcel's application for a certificate are entitled to be heard on the question of the "practical alternative" in the certificate proceedings.

Like the Commission, counsel for the United Parcel apparently holds the view that protestants have the burden of showing that United Parcel lacks ability. See Point (c) on page 16 of appellant's Statement as to Jurisdiction. United Parcel having failed even to try to establish the contrary, the assumption is warranted that United Parcel cannot *lawfully* operate at rates competitive with Parcel Post. At least there is no evidence that it can compete rate wise with Parcel Post except with the unlawful device of a weekly charge for daily pickup service regardless of need. Appellant operating with lawful rates established on the basis of cost studies, is not and the truckers have not been able to compete rate wise with Parcel Post (R. 367-370) [See Ex Parte No. 185, *Increased Express Rates and Charges, 1953*, 289 I. C. C. 249 (1953)].

(c)

The validity of the tariff device should be decided in the proceeding here involved.

The Solicitor General at page 9 of his brief urges that appellant's remedy is in a further proceeding before the Commission under Section 216(e) of the Act, 49 U. S. C. 316(e). But under that section the right to a certificate may not be challenged.

Since the application for the certificate was granted on the assumption by the Commission that United Parcel required volume to operate successfully and that United Parcel could attract volume from Parcel Post by reason of its low rates competitive with Parcel Post, and since the only evidence in the record that United Parcel can compete rate wise with Parcel Post is based upon the unlawful device of the weekly charge for pickup service regardless of demand or need, it is respectfully submitted that the validity of that device should be determined in the certificate proceedings.

Conclusion.

WHEREFORE, it is respectfully submitted (1) that the motion to affirm by the Solicitor General, and the motion to affirm by Intervening Defendant-Appellee, United Parcel Service, Inc., be denied; and (2) that this case be referred back to the United States District Court for the Southern District of New York with instructions to annul or set aside the orders of the Interstate Commerce Commission, or to suspend said orders and remand the case to the Interstate Commerce Commission for a determination of the legality of the $2.00 per week pickup charge on the present record or upon the present record and such additional evi-

dence as may be received after reopening the case and for the denial of United Parcel's application in the event said tariff device of the $2.00 per week pickup charge is found unlawful.

Respectfully submitted,

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